



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 33 OF 2016

RICHARD DAUDI NZYUKO.....1ST PLAINTIFF/APPLICANT

ALPHONCE MUENDO NZYUKO.....2ND PLAINTIFF/APPLICANT

VERSUS

RACHAEL KAILU NZIOKA.....1ST DEFENDANT/RESPONDENT

MUEMA NZIOKA.....2ND DEFENDANT/RESPONDENT

KELI NZIOKA.....3RD DEFENDANT/RESPONDENT

RULING

Introduction

1. Vide a Notice of Motion dated 12th July 2021, the Plaintiffs/Applicants sought for;

a) Spent

b) Spent

c) That this honourable court be pleased to grant a stay of execution of the judgment, decree and all consequential orders delivered on 25th day of June 2021, pending the hearing and determination of the intended appeal.

d) That the costs of this application be borne by the Defendants/Respondents.

2. The application is anchored on the grounds on its face as well as the affidavit of Alphonc Muendo Nzyuko in which he deposed that land parcel number Machakos/Katheka-Kai Block 4/180 belongs to the estate of Nzyuko Mbovu, which estate is administered by the Plaintiff/Applicants; that on 25th June 2021 judgment was entered against the Plaintiffs; that there is imminent threat of losing the suit property, hence substantial loss, if the decree is executed as the court ordered the committee of Katheka-Kai to issue a title in favour of the 1st Defendant; that the applicants need the suit property for purposes of taking care of their livestock; that the appeal has overwhelming chances of success and unless orders sought are granted the appeal may be rendered nugatory and that the application has been filed timeously.

3. The application is opposed. Rachel Kailu Nzioka, the 1st Defendant filed the replying affidavit sworn on 26th July 2021, in which she deposed that the defendants are the ones in possession of the suit property and that the applicants have not met the threshold for grant of the orders sought.

4. The application was canvassed by written submissions. On record are the applicants' submissions dated 15th November 2021 and the Respondents' submissions dated 14th October 2021.

Submissions

5. Counsel for the applicants submitted that under Order 42 Rule 6 of the Civil Procedure Rules, this court has jurisdiction to grant stay of execution when the court is satisfied that the applicant is likely to suffer substantial loss, that the application is made without unreasonable

delay and that security for the due performance of the decree is available. To buttress that argument, counsel relied on the case of *Charles Kariuki v Francis Kimaru Rwara (suing as Administrator of the estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased) [2020]*. It was further contended for the applicants that the judgment ordered the Committee of Katheka-Kai to register the suit property in the name of the 1st Defendant, which means that once that happens, the latter may dispose of the property to third parties, which may result in substantial loss against the applicants. Counsel concluded that the application had been filed timeously without any delay.

6. The Respondents submitted that for the court to exercise its discretion under Order 42 Rule 6 of the Civil Procedure Rules, the court must be satisfied that if the stay is not granted, substantial loss will be suffered by the Applicant and that the applicant must provide security for the due performance of the decree. Counsel argued that the applicants had not demonstrated that they stood to suffer substantial loss as they were not in possession of the suit property. Reliance was placed on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto (2012) e KLR, PWW V EKW [2019]* and *Focin Motorcycle Co. Ltd v Anne Wambui Wangui & Another [2018] eKLR*, for the respective propositions that execution alone is not proof of substantial loss on the part of the applicant, that the rights of both the decree holder and the appellant ought to be balanced and that the applicant ought to show his willingness to provide security.

Analysis and determination

7. I have considered the application, the affidavit in support, the response thereto and the submissions. The sole issue for determination is whether the applicant has met the threshold for grant of orders of stay of execution.

8. Order 42 Rule 6 of the Civil procedure Rules provide as follows;

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from, may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless-

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. In the case of *Butt v Rent Restriction Tribunal (1979) KLR*, the Court of Appeal stated that the power to grant stay pending appeal is discretionary and the discretion ought not be exercised in a manner that prevents the appeal. Secondly that the general rule is that if there is no overwhelming hindrance, a stay ought to be granted so as not to render the appeal nugatory in the event the appellate court reverses the judge's finding; and thirdly that a judge ought not refuse to grant stay if there are good grounds merely because the applicant may get a better remedy at the end of proceedings.

10. In this matter, the applicants have stated that they use the suit property for grazing their livestock. They argue that the judgement if executed will lead to the suit property being transferred to the 1st Defendant and they are apprehensive that the same may be disposed of to third parties, thus depriving them of the said property in the event the judgment herein is reversed, hence rendering their appeal nugatory. It is my considered view that indeed should the suit property be transferred to the 1st Defendant the same may be disposed of to third parties rendering their appeal merely an academic exercise.

11. However, it should not be lost that the Respondents have a judgment in their favour, and this court must ensure that both the applicants' and Respondents' rights are balanced so that an order of stay of execution does not give one party advantage over another. In the case of *RWW vs EKW [2019] eKLR*, the court held as follows;

The purpose for an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

12. To ensure that there is a balance between the rights of the decree holder and the appellant, the law provides that the applicant ought to show his willingness to provide security for the performance of the decree. In the case of *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Company Advocates & 2 Others [2014] eKLR*, it was held as follows;

The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

13. Upon consideration of the application herein, it is my considered view that this is a proper case where stay of execution pending appeal

ought to be granted. The decree herein is not monetary. Since this is a land matter, I do not think that it is imperative to order the applicant to provide security for costs.

14. In the premises, I allow the application dated 12th July 2021, as prayed. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27TH DAY OF APRIL 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Kavita for the Respondent

No appearance for the Applicant

Ms Josephine Misigo – Court Assistant